

Edward J. DeBartolo Corporation and Service Employees International Union, Local 750, AFL-CIO, CLC, Petitioner. Case 12-RC-7611

November 24, 1993

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The National Labor Relations Board has considered objections to an election held May 20, 1993, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 7 for and 3 against the Petitioner, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the Regional Director's findings and recommendations, and finds that a certification of representative should be issued.

The Employer contends that, shortly before the balloting commenced, agents and representatives of the Union engaged in activities that interfered with the employees' free choice in the election. The Employer argues, *inter alia*, that under the Supreme Court's decision in *Lechmere, Inc. v. NLRB*,¹ it lawfully ordered a union representative to cease talking to employees on its property, and that the representative's defiance of its instruction in the presence of employees was objectionable. For the reasons discussed below, we find no merit to the Employer's contentions.

The facts that follow are as adduced by the Employer. Within the 2-hour period prior to the election, Union Representative Stefano Sala walked into the Employer's food court, which is the unit employees' work area but which is also open to the public. Sala first spoke with an on-duty employee, Stubbs. The conversation was observed by the food court manager, Rivers. Stubbs later told Rivers that Sala had asked where another employee was. A few minutes later, Sala spoke with two other employees, Reddick and Munoz. Reddick was on duty, but Munoz was not. During the latter conversation, Rivers went to the floor of the food court to find Reddick, who had received a telephone call. Rivers approached the group and asked Sala what company or business he was with, and Sala replied that he was with the Union. Rivers thereupon ordered Sala to cease conversing with the employees.² Sala responded that he would talk to whom-

ever he pleased. At that point, Reddick left to take her telephone call, but Munoz remained in the food court in conversation with Sala for another 10 minutes. Except as already recounted, there is no evidence of anything that was said in any of Sala's conversations with the employees.

The Employer contends that Sala's refusal to cease talking with employees was objectionable and warrants setting the election aside. The Regional Director recommended that the objection be overruled, noting that the food court is open to the public, that there was no evidence as to the substance of the conversation between Sala and the two employees, and that Reddick promptly ceased to converse with Sala after Rivers' admonition. The Employer now argues, however, that *Lechmere*, *supra*, establishes an "absolute right of the Employer to order the Union organizer to cease his campaigning activities and to leave the area," and that Sala's open defiance of the exercise of this right created a coercive atmosphere of disproportionate union power.

We agree with the Regional Director, and find no merit in the contentions of the Employer. We note, to begin with, that *Lechmere* does not govern the disposition of this case. *Lechmere* addresses the circumstances in which an employer may exclude union organizers from its premises without committing an unfair labor practice. It is concerned, in other words, with whether the employer's conduct is lawful.³ There is no contention, however, that Sala had a legal right to talk to on-duty employees on the Employer's premises, or that the Employer, through Rivers, did anything unlawful by enjoining him not to do so.⁴ This is an election case. The issue before us is whether Sala, by refusing Rivers' arguably lawful instruction not to talk to the unit employees, destroyed the laboratory conditions necessary for a valid election. The test to be applied here is, thus, what it has long been in election cases—

told Sala not to talk to the employees; it does not state that he told Sala to leave the premises. The Employer thus has failed to proffer evidence supporting its contention that Sala was requested to leave. See *Ormet Corp.*, 122 NLRB 159, 162 (1958).

³Member Raudabaugh believes that *Lechmere* principles can be relevant to the disposition of a representation case. If, under *Lechmere* principles, a union representative has a right to be on the employer's property, the employer's ouster of the union representative will be unlawful and, a fortiori, objectionable if it occurs within the critical period. On the other hand, if, under *Lechmere* principles, a union representative has no right to be on the employer's property, his/her defiance of an employer's order to leave, occurring in the presence of employees, may constitute objectionable conduct. See *Phillips Chrysler Plymouth*, *infra*. In the instant case, Member Raudabaugh assumes *arguendo* that the union representative had no right to be on the Employer's premises. However, the Employer never ordered him to leave. Thus, the union conduct was not objectionable.

⁴For the purposes of this case, therefore, we assume, without deciding, that Rivers' actions would withstand scrutiny under *Lechmere*, as the Employer urges.

¹ 112 S.Ct. 841 (1992).

² The Employer also asserts that Rivers ordered Sala to leave the premises and that Sala refused. This assertion, however, is unsubstantiated. Rivers' memorandum describing the events of May 20, which is appended to the Employer's exceptions, states only that he

whether the Union's conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984).

In adopting the Regional Director's finding that Sala's activities did not interfere with the employees' free and uncoerced choice, we find this case distinguishable from *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991). In *Phillips*, the Board set aside an election because of the repeated and belligerent refusals of two union representatives, approximately 75 minutes before the election, to heed requests of the employer to cease talking with unit employees in the shop area and *to leave the premises*. The union representatives' defiant acts took place in front of a number of employees, and word thereof was assumed to have quickly spread to the rest. The two union representatives, moreover, remained in the shop and continued refusing to leave even after the police, summoned by the employer, arrived at the scene. The Board found that the union agents' conduct conveyed to the employees the message that the employer was powerless to protect its own legal rights in a confrontation with the union.⁵

In contrast with *Phillips*, Sala was not in a shop area but in the food court, an area open to the public. Moreover, the Employer proffers no evidence that he was ever asked to leave. Instead, according to the memorandum of the Employer's manager, he was told to cease talking to employees, one of whom was off duty, and he refused. Hence, there was no suggestion,

⁵ The Board observed in a footnote that the Union had not shown that it was unable to contact the employees away from the employer's premises or at another time and place. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956). That observation, however, merely indicates that the employer did not act unlawfully in insisting that the union representatives leave the area. It does not mean that, merely because the employer acted lawfully, the union representatives' defiance of the employer was necessarily objectionable.

as there was in *Phillips*, that the Employer was powerless to protect its property rights, because the Employer never *asserted* its property rights in the first place. There was never any battle, on this particular front, for the Employer to lose. Sala did refuse (once) to obey Rivers' order not to talk to the employees, but when he did so, the employee who was on duty at the time left the scene. The net result was that Sala continued to speak to only one employee, who was off duty, about an undisclosed subject, in an area that was open to the public. The police were not summoned; thus, Sala's actions could not be construed as in defiance of their authority. Finally, there is no indication that anyone other than the two employees present even knew of the incident.⁶ Accordingly, we agree with the Regional Director that the evidence proffered by the Employer is insufficient to support a finding that Sala's conduct reasonably tended to interfere with the employees' free and uncoerced choice in the election.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Service Employees International Union, Local 750, AFL-CIO, CLC, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time food court maintenance employees, including crew leaders, employed by the Employer at Altamonte Mall, but excluding office clerical employees, guards and supervisors as defined in the Act, and all other employees.

⁶ Member Devaney dissented in *Phillips* and Chairman Stephens did not participate in that decision. They both agree, however, that it is distinguishable. Chairman Stephens expresses no view on whether it was correctly decided.